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In the Supreme Court of the United States

October Term, 1980

No. _____

STATE OF CALIFORNIA,

Petitioner,

v.

WILLIE EDWARD LEVEL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Court of Appeal of the State of California reversing the judgment of guilt of second degree murder entered on February 28, 1980, with one of the three Justices (Hanson, J.) voting to affirm the judgment of conviction. A petition for rehearing was denied on March 26, 1980, with a short opinion, with one Justice voting to grant said petition for rehearing. A petition for hearing in the Supreme Court of the State of California was denied on April 30, 1980. On May 13, 1980, the California Court of Appeal granted a stay herein pending the timely filing of and disposition of a petition for writ of certiorari.

OPINIONS BELOW

The opinion of the California Court of Appeal reversing the judgment of second degree murder in *People v. Level,* 103 Cal. App.3d 899, 162 Cal. Rptr. 682 (1980), appears as appendix A of this petition. A copy of the opinion on the denial of the petition for rehearing by the California Court of Appeal appears as appendix B of this petition. (*People v. Level,* 103 Cal. App.3d 899, 925-928, _____ Cal. Rptr. _____, _____ (1980).) A copy of the California Supreme Court's order denying the petition for hearing appears as appendix C of this petition. A copy of the Stay granted May 13, 1980, by the California Court of Appeal pending the timely filing and disposition of the petition for writ of certiorari appears as appendix D of this petition.

JURISDICTION

The judgment of the California Court of Appeal was filed on February 28, 1980. A timely petition for rehearing was denied by the Court of Appeal on March 26, 1980. A timely petition for hearing was denied by the California Supreme Court on April 30, 1980. This petition for writ of certiorari was filed within 90 days of that date and therefore timely filed. (*United States v. Healy* (1974) 376 U.S. 75, 77-80, and cases cited.) This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether there is an invocation of the right to remain silent, if an *adult,* after being warned of and waiving his constitutional rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, requests to have his mother present before speaking to the authorities?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Twenty-Sixth Amendment to the United States Constitution reads:

> "Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
>
> "Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

Section 1538.5 of the California Penal Code reads:

> "§ 1538.5 Motion to return property or suppress evidence
>
> "(a) Grounds
>
> "(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:
>
> "(1) The search or seizure without a warrant was unreasonable.
>
> "(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; * * * (v) there was any other violation of federal or state constitutional standards.

"(b) First hearing

"(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

"(c) Evidence

"(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

"(d) Effect of granting motion

"(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

"(c) Return of property

"(c) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has

expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

"(f) Felony; motion at preliminary hearing

"(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

"(g) Misdemeanor; pre-trial motion at special hearing

"(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

"(h) Motion at trial

"(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

(i) Felony; renewal of motion at special hearing; review

"(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

"(j) Relitigation of question after grant of motion; new evidence, review

"(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in

any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an informaton, the people within * * * *15* days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and

defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

"(k) Release of defendant pending resumption of proceedings in trial court

"(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

"If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

"(l) Stay; time for trial; dismissal; continuance; bail or release

"(l) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specific date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the

discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

"(m) Exclusive pre-trial remedy; review on appeal after conviction

"(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offerred [*sic*] or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

"(n) Motion on other grounds; existing law and procedure

"(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue

of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

"(o) People's petition for mandate or prohibition; notice of intention

"(o) Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant." (Emphasis in original.)

California Civil Code section 25 reads:

"Minors are all persons under * * * *18* years of age." (Emphasis in original.)

California Civil Code section 25.1 reads:

"The Legislature intends that any use of or reference to the words 'age of majority,' 'age of minority,' 'adult,' 'minor,' or words of similar intent in any instruction, order, transfer, or governmental communication whatsoever made in this state:

"(a) Before March 4, 1972, shall make reference to persons 21 years of age and older, or younger than 21 years of age, and

"(b) On or after March 4, 1972, shall make reference to persons 18 years of age and older, or younger than 18 years of age.

"Nothing contained herein or in Chapter 1748 of the Statutes of 1971 shall prevent the amendment of any court order, will, trust, contract, transfer, or instrument to refer to the new 18-year-old age of majority where such court order, will, trust, contract, transfer, or instrument is:

"(1) In existence on March 4, 1972; and

"(2) Subject to amendment by law and where amendment is allowable or not prohibited by the terms thereof; and

"(3) Otherwise subject to the laws of this state."

California Welfare and Institutions Code section 602 reads:

"Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime * * * *other than an ordinance establishing a curfew based*

> *solely on age,* is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court." (Emphasis in original.)

STATEMENT OF THE CASE

Petitioner hereby adopts the Statement of Facts of the crime for which respondent Level was convicted as set forth in the majority opinion of the California Court of Appeal in *People v. Level, supra,* 103 Cal. App.3d 899, 902-903. (Appendix A, pp. 39-41.)

> "Frances Brown and her husband attended evening classes at Bakersfield College. On November 15 she died of hemorrhage and cerebral laceration due to blunt force trauma with skull fracture by the hand of defendant.
>
> "About 6 p.m. Frances left her husband studying in their van parked in the college parking lot to attend a class. Shortly after 6 p.m. a student observed Frances carrying her books walk in the parking lot followed about 20 feet behind by defendant carrying a metal table leg with which he was poking the ground while he walked. Later her husband in the van saw Frances return to the parking lot followed by a man about 6 feet behind; when he looked up again he heard a thud and saw her hit the ground and bounce, then saw defendant bend over her, pick her up and try to drag her toward another car; he got out of the van and briefly pursued defendant who ran away; Frances was unconscious and died soon thereafter in a hospital. Her books, purse and keys were strewn about; a

metal table leg was on the ground.[1]

"Defendant, who fit the description of the suspect, was arrested by police on the campus at 6:20 p.m.; fresh splattered blood was on his hands and shoes; his fingerprints were on the table leg. He gave written consent to search his car. A letterman's jacket was found in the trunk of the car; a description of the clothes worn by the suspect included a letterman's jacket. Tests showed that blood taken from the defendant's hands and his jacket, was not consistent with his blood type; blood on the metal table leg and jacket was consistent with that of Frances. A 'TMDT' (metal detection) test indicated traces of steel in his right hand. After having been given his *Miranda* rights and waived the same, defendant made a confession which was received in evidence.

"In his testimony[2] defendant attempted to establish self defense."

"[1]This table leg was identified by the student as the same one he earlier had seen defendant carrying while following Frances.

"[2]Defendant testified that he thought Frances looked 'appealing,' so he decided to try to 'socialize' with her; she rebuffed him when he approached her, and he loitered around while she walked away; he became curious why she did that; he had a table leg which he was using batting 'paper and stuff,' followed her, caught up with her and asked her why she had turned from him; she replied 'Because you Niggers are dirty and low down and if you don't get your black ass away from me I am going to blow your head off'; she reached for her purse and he thought she was reaching for a weapon; he saw something shiny in her hand, he tried to hit her in the back with the table leg, but she moved and bent her legs and the table leg struck

Petitioner further adopts the Statement of Facts relative to the motion to suppress respondent Level's statements to the authorities from the dissent of Justice Hanson. As discussed in *People v. Level, supra,* 103 Cal. App.3d 899, 910 fn. 3 (Appendix A, p. 51), Justice Hanson in his dissent used the following procedural history of the motion to suppress:

> "The admission of the tape recording in question was either sought to be suppressed or objected to on three separate occasions during the more than a year the case was in the trial court and in each instance the request was denied.
>
> "The *first* occasion was at defendant's motion to suppress the tape pursuant to Penal Code section 1538.5 before Judge P.R. Borton in the Kern County Superior Court at the February 21 and 28, 1978, hearing. The court denied the motion. This is the hearing which is before this court on appeal.
>
> "The *second* occasion was when defense counsel renewed the motion to suppress the tape before Judge Bruce A. Thompson, the trial judge, following the change of venue to Ventura County. The motion was submitted on the transcript of the February 1978 hearing and was again denied.

(footnote continued from previous page)

her head; she fell; he knew he could not just leave her there, so he picked her up to see what was wrong with her and a man chased him; he returned to his car and put the jacket in the trunk then returned to the campus."

> "The *third* occasion was following the trial when defense counsel raised the issue again as one of his grounds supporting the defense motion for a new trial. Judge Thompson denied the motion for a new trial." (Emphasis in original.)

The controlling facts relative to the motion to suppress, which was the subject of both the majority and dissenting opinions of the Court of Appeal, are adopted herein from the dissent in *People v. Level, supra,* 103 Cal. App.3d 899, 911-916 (omitting footnote 5) [Appendix A, pp. 52-60 of Justice Hanson's dissenting opinion].):[1]

> "The record shows that neither Officer Dennis Armour, who apprehended the defendant in the quad area of the Bakersfield College campus shortly after the murder, nor Officer Robert Anthony Ennis, who transported defendant to the Bakersfield police station and stayed with him until the detective in charge arrived, questioned the defendant about the facts of the offense. It was the department policy that the detectives conduct all investigations. Officer Singleton, a detective with 14 years experience, who was assigned to the case conducted the

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[1]The majority, in reversing, concluded that the trial court erred when it denied said motion relative to defendant's taped statements in that defendant had invoked his right to remain silent. The dissent concluded to the contrary, and maintained that the judgment should be affirmed. (*People v. Level, supra,* at pp. 905, 918 [Appendix A, pp. 43-44, 64].)

interview. Set out *haec verba* in footnote 4 below are the portions of Officer Singleton's testimony at the hearing on the 1538.5 motion relevant to the issue before us. This testimony appears in only 9 pages of the total of about 2,000 pages of reporter's transcript comprising the complete record on appeal.

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[4]Following is the relevant testimony of Officer Singleton at the defendant's motion to suppress the taped confession in question:

'[DIRECT EXAMINATION]

'[BY MR. McNUTT (deputy district attorney)]

'Q Prior to conducting an interview with the suspect, were you aware of the fact he was under arrest?

'A Yes, sir.

'Q Was your interview with him relating to a possible homicide at B.C.?

'A It was a homicide at that time.

'Q It had been confirmed as a homicide?

'A Yes, sir.

'Q *Prior to conducting an interview with the defendant, did you advise him of his constitutional rights per Miranda*?

'A *Yes, sir.*

'Q And for that purpose, did you utilize any artificial devices?

'A I used a card provided by the Police Department.

'Q And do you have that same card with you here today?

'A Yes, sir.

'Q *Would you recite on the record, please, exactly what you related to Mr. Level on November 15th, prior to conducting your interview with him?*

'A *Yes. "Number one, you have the right to remain*

(footnote continued from previous page)

silent." And I asked him if he understood what that meant. "Yes." "Two, anything you say can and will be used against you in court." And I asked him if he understood those. And he stated he did. "Three, you have the right to consult with a lawyer before answering any questions and have a lawyer with you during any questioning." And I asked him if he understood that, and he said, "Yes." The fourth one, "If you cannot afford a lawyer, one will be provided free of cost, if you want one." And I asked him if he understood that, and he said, "Yes." And I asked, "Having these rights in mind, do you want to go ahead and make a statement to Detective Horton and myself regarding your involvement, if any, in the assault?", and he said he would.

'Q Did you indicate to him at that time that the victim had died?

'A Yes, sir.

'Q Was he advised of the fact he was under arrest as a suspect in the killing of that victim?

'A Yes, sir.

'Q Was this Mirandazation on tape?

'A No, sir.

'Q Did you subsequently to giving him his rights and obtaining the waiver, interview him regarding the possible homicide?

'A Yes, sir.

'Q And was that on tape?

'A No, sir.

'Q For what length of time did you conduct an interview with him regarding the homicide?

'A It was approximately one hour.

'Q Subsequent to that interview, did you conduct another interview?

'A Yes.

'Q Was that interview on tape?

(footnote continued from previous page)

'A Yes, sir.

'Q How soon after the first interview did the second interview take place?

'A It commenced, I believe, at 11:40 p.m.

'Q On the same date?

'Q Yes, sir.

'Q Why the break between the first interview and the second interview?

'A We initially got the initial statement from him, and then at one point he requested to talk with his mother. And we allowed him to do that; to make a phone call to his mother.

'Q *Did he at any time indicate that he did not want to talk to you anymore or that he wanted an attorney?*

'A *No, sir.*

'Q Did he in fact talk with his mother?

'Q Yes, sir.

'Q How soon after that was it you conducted the second interview on tape?

'A It was shortly after his conversation. We were waiting for her to come down to the police station. Before he wanted to make the phone call to his mother, I got the impression that he did want to make a statement regarding the actual facts of the assault. But he was for some reason or other, uneasy. And so we let him make the phone call to his mother. And afterwards, we went back to the room, talked a little longer, and I asked him if he would make a statement if it was tape recorded; therefore, there could be no way that we could indicate in the report other than what he stated to us.

'Q And who indicated that this second interview should be on tape?

'A I asked if he would go ahead and make a statement without his mother there, if we tape recorded it, and he indicated he would.

(footnote continued from previous page)

'Q Was he in effect asking that the second interview be taped?

'A Yes.

'MR. KING [deputy public defender]: Objection, your Honor, as calling for a conclusion.

'THE COURT: Sustained.

'Q (by Mr. McNutt) *Did he ask that the second interview be taped*?

'A *I suggested it to him, and he said he wished it taped.*

'MR. McNUTT: Your Honor, and Counsel, I don't believe it's necessary for the purpose of the proceedings to go into the content of the conversation. I will offer a stipulation that the officer would testify to the content of the conversation as contained in the officer's report and the preliminary transcript, and the second interview was taped. Unless Counsel for some reason wants to go into it at this time, that is. I would also stipulated [*sic*] there is relevant, and material, and possibly incriminating evidence contained in those statements.

'MR. KING: I think in this hearing, your Honor, that the record should be complete. I am not prepared to stipulate at this time.

'THE COURT: All right, Mr. McNutt.

'MR. McNUTT: With the Court's permission then, I will stop my direct at this point. I simply wanted to establish the Miranda warning. And Counsel can get as much as he wants in getting out testimony.

'THE COURT: All right.

'CROSS-EXAMINATION

'BY MR. KING:

'Q Mr. Singleton, prior to interviewing Mr. Level, did you have any conversation with Mr. Ennis?

'A I believe I went into the lab twice — once when I got back to the station from being out in the field, and I just briefly looked in the lab, and observed Mr. Level and Mr.

(footnote continued from previous page)

Ennis, and told them I would get to them as soon as possible. And then after my interview with the victim's husband and two other individuals, I again went in, and told them I would be just a few more minutes. But I had no direct conversation with Mr. Ennis.

'Q Did you talk to Mr. Ennis regarding the search of the car?

'A I had no idea there was a car at the college.

'Q When did you first learn about a car being involved in this case?

'A It was after one of the interviews — one of the three interviews — I don't know which one — I learned that they had found a jacket, and that there was blood on the jacket.

'Q Do you know what time that was?

'A No, I have no idea, sir.

'Q Was it before you talked to Mr. Level?

'A Oh, yes, sir.

'Q And whom did you learn or obtain that information from?

'A I do not recall, but it was not from Mr. Ennis.

'Q Was it Mr. Foy?

'A I don't belive I saw Mr. Foy that night.

'Q You were talking about three interviews? Who were the subjects in those interviews?

'A The victim's husband, Mr. Brown; Bill Pedeton; and a Kirk Brown.

'Q And where did these interviews take place?

'A At the Police Department.

'Q And these were the possible witnesses to the offense?

'A That is correct, sir.

'Q And when you interviewed them, you used a tape recording of their conversation?

(footnote continued from previous page)

'A That is correct, sir.

'Q When you interviewed Mr. Level, you did not use a tape recorder? Is that right?

'A That is correct, sir.

'Q And where was the tape recorder at the time that you had previously used for the three witnesses?

'A Either in my office or in the — I believe it was in my office.

'Q Was there anything defective with that tape recorder?

'A No, sir.

'Q Was there any particular reason that you did not use the tape recorder when you talked to Mr. Level?

'A Normally, it makes individuals very uneasy, and they won't talk, or they feel hesitant for some reason, and it intimidates them.

'Q You did not feel that was true, however, when you interviewed the three witnesses?

'A No, because they are not suspects.

'Q Now, in the first statement that you obtained from Mr. Level, did he indicate to you he wanted to phone his mother?

'A It was towards the end. That's when we broke when he wanted to place a phone call to his mother.

'Q And he told you that he did not want to talk to you until he had talked to his mother?

'A *It is not that he didn't want to talk to me. He did not want to make a statement regarding the actual facts of the assault without talking to his mother.*

'Q *And you allowed him to make the phone call?*

'A *That is correct.*

(footnote continued from previous page)

'Q Did you monitor that phone call?

'A No, sir.

'Q Did any officer, to your knowledge, monitor that phone call?

'A No, sir.

'Q How long did the phone call last?

'A Two or three minutes.

'Q And what time was it made?

'A Sometime between 11:10 and, I would say, maybe 11:15 or 11:20.

'Q And after the phone call, Mr. Level told you that he wanted to have his mother present before he made any statement?

'A Yes, sir.

'Q *And you did not stop questioning him?*

'A *No, sir. We were back in the interview room, waiting for her to respond to the station, and we were just sitting there, talking. And I* suggested *that he might not want to say something in her presence. He might feel uncomfortable, but if we put it on tape, then there would be no question as to what his statement was.*

'Q Did you tell Mr. Level that if he wanted to make the taped statement, that you would show it to his mother and let her listen to it when she arrived?

'A I don't recall saying that.

'Q *Mr. Level's statement to you was he wanted to have his mother present* when *he gave you a statement?*

'A *That's the impression I got, yes, sir.*

'Q Did he say that?

'A I don't recall.

'Q *Do you recall testifying at the preliminary hearing?*

'A *Yes, sir.*

(footnote continued from previous page)

'Q *Do you recall being questioned that when Mrs. Level came down to the station, he wanted to talk to her before he gave a statement? Do you recall being asked that?*

'A *Yes.*

'Q *And do you recall answering, "He (indicating Mr. Level) would like to have her present* while *he was making the statement?"*

'A *Yes, sir.*

'Q Did he tell you that?

'A I don't recall if I was told or I just got that impression.

'Q Do you recall making the answers I have read to you?

'A No, sir.

'Q MR. KING: Your Honor, may I approach the witness with the transcript of the preliminary hearing?

'THE COURT: Certainly.

'MR. KING: Page 1119, Line 25.

'THE WITNESS: He indicated he wanted to talk to her before he gave a statement. That's at Line 25?

'MR. KING: Line 27?

'A Yes, sir, that's in the transcript.

'Q *He indicated he wanted to have his mother present when he gave you a statement?*

'A *Yes, sir.*

'Q And then you *suggested* to him that he make a tape recording instead of having his mother present?

'A That's correct, sir.

'Q Did you ever indicate to him that his mother would be allowed to listen to the tape recording?

'A I don't think so.' (Italics added.)

"In defendant's statement tape recorded by Officer Singleton which the defense sought to have suppressed and which was admitted into evidence and played to the jury during the trial, he said that he was at the Bakersfield College campus looking for a friend named Mylo and picked up a metal table leg which he found on campus; that while he was using it to hit at a piece of paper and walking toward the parking lot he saw the victim; that he started to follow her and said: 'Hey. Do you have a few minutes?'; that his intention was to 'get any information like her phone number or . . .'; and that the victim said: 'I don't have any time for any niggers' and walked away. The defendant stated that he 'got mad as hell for what she said' and hit her with the metal table leg using it 'like a bat'; that when he tried to drag her away 'the guy jumped out from wherever he was, he came from somewhere and ran towards me' so he dropped the victim and ran away; that he went to his car and put his letterman's jacket in the trunk because he 'didn't want anybody to see the jacket'; and when he went back into campus looking for his friend Mylo he was arrested by the police officer. When asked what defendant did with the table leg, he said: 'I just dropped it, left it there.' When asked toward the end of the tape if 'there [was] anything else that happened that we haven't asked you about?' the defendant answered, 'Not that I can think of.' At the end of the tape the defendant apparently confirmed that he was read his rights and that he was not promised or threatened in any way and that he gave his statement freely and voluntarily. . . ."

"The trial court denied defendant's motion to suppress the above taped confession and it was admitted into evidence." (Footnote omitted.)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

WHENEVER AN ADULT REQUESTS TO HAVE HIS MOTHER PRESENT BEFORE MAKING A STATEMENT TO THE POLICE, AFTER WAIVING HIS CONSTITUTIONAL RIGHTS, THERE IS NO INVOCATION OF ANY RIGHT TO REMAIN SILENT.

In a far reaching opinion, the majority of the Court of Appeal, contrary to recent constitutional interpretations of this Court, in effect holds that when an adult requests to have his mother present before speaking to the police, that such is an invocation of a right to remain silent under *Miranda v. Arizona* (1966) 384 U.S. 436. (*People v. Level, supra,* 103 Cal. App.3d 899, 905-906 [Appendix A, pp. 43-45].) It is urged that such an overly broad interpretation of *Miranda* goes beyond the scope and purpose of said decision and is in conflict with recent pronouncements of this Court relative to the breadth of the *Miranda* doctrine.

To say that a request by an *adult* to have his mother present before making a statement to the authorities is an invocation of the right to remain silent, creates an overreaching misinterpretation of the *Miranda* decision and obliterates guidelines for law enforcement to follow in their attempt to comply with the constitutional principles enunciated by the courts. As pointed out by Justice Hanson in his dissent, respondent Level was transported from the quad area of the Bakersfield College Campus shortly after the murder and then was taken to the

Bakersfield Police Station during which time, he was not questioned about the facts of the offense. (*People v. Level, supra* at p. 911 [Appendix A, p. 52].) At the police station, respondent Level was warned of his constitutional rights in pertinent part as follows:

> ". . . . 'Number one, you have the right to remain silent.' And I asked him if he understood what that meant. 'Yes.' 'Two, anything you say can and will be used against you in court.' And I asked him if he understood those. And he stated he did. 'Three, you have the right to consult with a lawyer before answering any questions and have a lawyer with you during any questioning.' And I asked him if he understood that, and he said, 'Yes.' The fourth one, 'If you cannot afford a lawyer, one will be provided free of cost, if you want one.' And I asked him if he understood that, and he said, 'Yes.' And I asked, 'Having these rights in mind, do you want to go ahead and make a statement to Detective Horton and myself regarding your involvement, if any, in the assault?', and he said he would." (*People v. Level, supra,* at pp. 914 fn. 4 [Appendix A, pp. -]; Supp. RT 43-44.)

The police interviewed respondent Level for approximately an hour regarding the homicide. At no time did respondent Level indicate that he did not want to talk to them anymore and that he wanted an attorney. (*People v. Level, supra,* at pp. 912 fn. 4 [Appendix A, p. 54]; Supp. RT p. 45.)

Towards the end of the first conversation, respondent Level said he wanted to place a phone call to his mother. It was not that he did not want to talk to the authorities, respondent Level did not want to make a statement

regarding the actual facts of the assault without speaking to his mother. The police allowed him to make that telephone call to speak to his mother. It was the officer's impression that respondent Level wanted to have his mother present when he gave a statement. After the telephone call to his mother, respondent Level said that he wanted to have his mother present before he made any statement. He indicated that he wanted his mother present when making the statement. (*People v. Level, supra,* at pp. 914, 915 fn. 4 [Appendix A, pp. 56-59]; Supp. RT 44-51.)

While the police were back in the interview room waiting for respondent Level's mother to respond to the station, they were sitting there talking. The officer suggested that respondent Level might not want to say something in her presence and might feel uncomfortable but if they put the matter on tape, there would be no questions as to what his statement was to the authorities. (*People v. Level, supra* at p. 914 fn. 4 [Appendix A, p. 58]; Supp. RT 49-51.) There was a second interview which was tape recorded in which respondent Level spoke about the attack on the victim. (*People v. Level, supra,* at pp. 912 fn. 4 [Appendix A, p. 54]; Supp. RT 44-45.)

Based upon the above factual context, the California Court of Appeal held: (1) respondent Level was asserting his right to remain silent when he asked to have his mother present before making any statement, and (2) the police erred in continuing to talk with respondent Level after he asked for the presence of his mother. (*People v. Level, supra,* at pp. 905-907 [Appendix A, pp. 43-47].)

Upon filing of a petition for rehearing by petitioner, the majority of the California Court of Appeal attempted to clarify their opinion by means of the following language:

> "In light of the Petition for Rehearing filed by respondent [Petitioner State of California], we add the following, equally established: an adult has no right to demand that a parent (or anyone else, other than a lawyer) be present during questioning (*cf. People v. Burton* (1971) 6 Cal.3d 375, 383-384; *Fare v. Michael C.* (1979) _____ U.S. _____), but he does have a right to 'indicate in any manner . . . that he wishes to remain silent.' That is what defendant did. His doing so required that the questioning cease." (*People v. Level, supra,* at p. 928 [Appendix B, pp. 78-79].)

It is urged that the majority of the Court of Appeal's holding that respondent Level invoked his rights when he requested to have his mother present before making a statement to the authorities, is not only a manifest misinterpretation of the *Miranda* doctrine, but it is also contrary to the recent opinion of this Court in *Fare v. Michael C.* (1979) 442 U.S. 707.

In *Michael C.* this Court rejected the argument that a *minor* invoked his *Miranda* rights by requesting a probation officer noting that *per se* aspects of the *Miranda* safeguards were limited to a request for an attorney. (*Fare v. Michael C., supra,* at p. 719.) Thus in *Michael C.* this Court cast great doubt upon the viability of the California Supreme Court decision of *People v. Burton,* 6 Cal.3d 375, 381-388; 99 Cal. Rptr. 1, 5-7, 491 P.2d 793, 797-799 (1971); which held that a *minor* invoked his right to remain silent when requesting the presence of a parent. (*Fare v. Michael C., supra,* at pp. 715-716 fn. 3; *People v. Alfieri,* 95 Cal. App.3d 533, 544, 157 Cal. Rptr. 304, 311 (1979).) While it appears that the doctrine set forth in *Burton* is no longer tenable under *Michael C.*, the facts of

this case do not even rise to the status of the situation in *Burton* since respondent Level at the time of questioning was *not a minor but an adult.*

At the time of the murder and the interrogation, respondent Level was 19 years of age. (*People v. Level, supra,* at p. 906 fn. 3 [Appendix A, p. 45]; Supp. RT 37.) Under the 26th Amendment to the United States Constitution, section 1, it is stated:

> "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

In California, the age of majority is that of 18 years under California Civil Code sections 25 and 25.1. Under the California Welfare and Institutions Code, section 602, the juvenile court only asserts jurisdiction over those persons who commit crimes under the age of 18. As Justice Hanson pointed out in his dissent:

> ". . . . In the instant case the evidence is uncontradicted that the defendant was not a minor but was an adult having reached his majority, being 19 years old at the time of the murder. He had shed the protective cocoon the law affords to minors and assumed the responsibilities and obligations of an adult." (*People v. Level, supra,* at p. 917 [Appendix A, p. 62].)

To hold that an adult requesting his mother is tantamount to a request for a lawyer would in effect convey the *Miranda* doctrine into the arena of the unworkable. As this Court stated at page 719 of *Michael C*:

> "The rule in *Miranda,* however, was based on this Court's perception that the lawyer occupies a critical position in our legal system because of

> his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that 'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system' established by the Court. *Id.*, at 469. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements acutally obtained are accurately transcribed for presentation into evidence. *Id.*, at 470.
>
> "The *per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."

Just as a probation officer was found not to be in the same position as an attorney under the judicial system, so is a parent even less equipped to assume the role demanded of a lawyer in the court process. In addition, the attempt of the Court of Appeal in the opinion on the denial of rehearing to distinguish *Michael C.*, fails. While the Court of Appeal conceded that an adult has no right to demand

the presence of a parent (or non-lawyer) during questioning, its conclusion that respondent Level's request to have his mother present before making a statement was an invocation of his right to remain silent, is a distinction without a difference. (*People v. Level, supra,* at p. 928 [Appendix B, p. 79].)

In fact, this attempt at distinction, enunciated by the Court of Appeal in its opinion denying rehearing, was in effect rejected by this Court when at pages 723 and 724 of the *Michael C.* opinion it was stated:

> "Nor do we believe that a request by a juvenile to speak with his probation officer constitutes a *per se* request to remain silent. As indicated, since a probation officer does not fulfill the important role in protecting the rights of the accused juvenile that an attorney plays, we decline to find that the request for the probation officer is tantamount to the request for an attorney. And there is nothing inherent in the request for a probation officer that requires us to find that a juvenile's request to see one necessarily constitutes an expression of the juvenile's right to remain silent. As discussed below, courts may take into account such a request in evaluating whether a juvenile in fact had waived his Fifth Amendment rights before confessing. But in other circumstances such a request might well be consistent with a desire to speak with the police. In the absence of further evidence that the minor intended in the circumstances to invoke his Fifth Amendment rights by such a request, we decline to attach such overwhelming significance to this request."

Thus, under *Michael C.* a request, especially by an adult,

to have his mother present before making a statement, would not constitute a *per se* request to remain silent.

The interpretation of *Miranda*, set forth by the California Court of Appeal, is not only contrary to *Michael C.*, it is also in conflict with the recent decision of this Court of *North Carolina v. Butler* (1979) 441 U.S. 369. In *Butler* this Court held that an explicit statement of waiver is not always necessary to support a finding that there was a waiver of the right to counsel under *Miranda*. Rather, in *Butler*, the question of waiver is to be determined on the particular facts and circumstances surrounding the case and therefore the concept of an inflexible *per se* rule was rejected. (*North Carolina v. Butler, supra,* at pp. 374-375.) The California Court of Appeal majority opinion, contrary to both *Michael C.* and *Butler* has created a *per se* rule that whenever an individual, whether adult or minor, requests to have his mother present before questioning such is automatically an invocation of the right to remain silent.

In *Butler,* the defendant after being warned of his constitutional rights and stating he understood them and agreeing to speak with the authorities, refused to sign "An Advisement of Rights Form." (*North Carolina v. Butler, supra,* at pp. 370-371.) This Court held that the mere fact that the defendant in *Butler* refused to sign the form, did not in itself show an invalid waiver but rather the question of waiver had to be determined on the particular facts and circumstances surrounding the case. (*North Carolina v. Butler, supra,* at pp. 374-375.)

As such, the mere fact of an adult's request to have his mother present before speaking to the authorities should not be deemed an invocation of the right to remain silent as it creates an inflexible *per se* rule condemned both in *Michael C.* and *Butler*. Rather, the test as described in

Michael C. at pages 724-725, is:

> ". . . . Thus, the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel. *Miranda v. Arizona,* 384 U.S., at 475-477."

The totality of the circumstances reflects a knowing and voluntary waiver in this case. As has been discussed, respondent Level was advised of his constitutional rights which he waived and never indicated that he did not want to talk to the authorities or that he wanted an attorney. (*People v. Level, supra,* at p. 912 fn. 4 [Appendix A, pp. 53-54]; Supp. RT 43-45.) At the end of the taped conversation, respondent Level apparently confirmed that he was read his rights and that he was not promised or threatened in any way and that he gave his statement freely and voluntarily. (*People v. Level, supra,* at pp. 915-916 [Appendix A, p. 60]; RT 1279-1280.)

Furthermore, there is no doubt that the majority opinion of the Court of Appeal in holding that respondent Level invoked his right to remain silent by requesting the presence of his mother before speaking to the authorities, did so on purely *federal* grounds.

The majority opinion, as earlier discussed, ruled that (a) respondent Level invoked his right to remain silent when he asked for the presence of his mother before speaking to the authorities, and that (b) the police erred in resuming the interview after respondent Level's request for his mother. (*People v. Level, supra,* at pp. 905-907 [Appendix A, pp. 43-47].)

The cases cited by the court for its ruling that the request for the mother was an invocation of the right to remain silent were all cases interpreting this Court's decision in *Miranda*; that is, *People v. Superior Court (Keithley),* 13 Cal.3d 406, 410, 118 Cal. Rptr. 617, 619, 530 P.2d 585, 587 (1975); *People v. Burton, supra,* 6 Cal.3d 375, 381-388, 99 Cal. Rptr. 1, 5-7, 491 P.2d 793, 797-799 (1971); *People v. Randall,* 1 Cal.3d 948, 954-955, 83 Cal. Rptr. 58, 62, 464 P.2d 114, 118 (1970); *People v. Marshall,* 41 Cal. App.3d 129, 134, 115 Cal. Rptr. 821, 824 (1974); *People v. Parker,* 45 Cal. App.3d 24, 29, 119 Cal. Rptr. 49, 52 (1975); note the In Chambers Opinion of Justice Rehnquist in granting the stay of petitioner in *Fare v. Michael C.* (1978) 439 U.S. 1310, 1311.)

Any doubt that the Court of Appeal rested its decision on federal grounds in holding that respondent Level invoked his right to remain silent when asking for his mother's presence, is completely dispelled by the clarification of the opinion in the order denying rehearing. There the Court of Appeal cited *Miranda, Michael C.* and *People v. Burton, supra,* for the authority that while an adult has no right to demand a parent to be present during questioning, he does have a right to indicate in any manner that he wishes to remain silent. (*People v. Level, supra,* at pp. 925-928 [Appendix B, pp. 78-79].)

As such, the majority opinion of the Court of Appeal on this issue is an interpretation of both *Miranda* and *Michael C.* and as such purely one of federal dimension. It should be noted that the California Supreme Court upon remand of the *Michael C.* opinion affirmed the judgment citing as authority the *Michael C.* opinion of this Court. (*In re Michael C.*, Number 11, April 17, 1980 California Advance Sheets, Minutes of the California Supreme Court, p. 11 (Crim. 19921, April 1, 1980).) Therefore,

upon the remand the California Supreme Court declined to reject the *Michael C.* opinion by means of independent state grounds but instead affirmed the judgment in light of *Michael C.*

Arguably, the second holding of the majority of the Court of Appeal that it was error for the authorities to resume speaking to respondent Level *after* he requested the presence of his mother was based on independent state grounds by reason of the citation of *People v. Pettingill,* 21 Cal.3d 231, 246-251, 145 Cal. Rptr. 861, 873-874, 578 P.2d 108, 117-121 (1978). (*People v. Level, supra,* at p. 907 [Appendix A, p. 46].) *Pettingill* refused to follow this Court's decision in *Michigan v. Mosley* (1975) 423 U.S. 96, by relying on independent state grounds. However, *Pettingill* is cited *solely* on the issue that the police should not have continued to speak to respondent Level after his request to have his mother present on the grounds that it was improper for the police to talk to him when he had invoked his right to remain silent. The issue raised in *Pettingill* becomes totally irrelevant and moot if in fact there was no invocation of the federal constitutional right to remain silent when respondent Level requested to have his mother present before questioning.

If in fact, under the Federal Constitution, respondent Level did not invoke his right to remain silent when he asked to have his mother present before speaking to the authorities, the police under *Pettingill* could continue to speak to him. Therefore the issue presented is purely federal in nature and subject to review by this Honorable Court, ". . . since a state court can neither add to nor subtract from the mandates of the United States Constitution." (*North Carolina v. Butler, supra,* at p. 376; *Oregon v. Hass* (1975) 420 U.S. 714, 179.)

In order for the standards of *Miranda v. Arizona* to be

workable, they must be limited by realistic guidelines for law enforcement to follow. The question raised by the majority opinion of the Court of Appeal is where the line is to be drawn. *Michael C.* has created realisitic circumscriptions by reason of limiting that line to a licensed attorney. However, the majority Court of Appeal opinion could conceivably expand those limits to include not only parents but other relatives, friends, acquaintances or persons arbitrarily picked from within or outside the community. It is therefore strongly urged that the within petition be granted because no purpose set forth in the *Miranda* decision is served when an adult can be said to invoke his right to remain silent by merely asking for the presence of his mother before being questioned by the authorities.

CONCLUSION

For the foregoing reasons, petitioner submits that the writ of certiorari should issue and review the decision of the Court of Appeal of the State of California.

Respectfully submitted,

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APPENDIX

Appendix A

In the Court of Appeal State of California

SECOND APPELLATE DISTRICT DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE EDWARD LEVEL,

Defendant and Appellant.

2 Crim. No. 34398
(Super. Ct. No. 14108)

CERTIFIED FOR PUBLICATION

APPEAL from a judgment of the Superior Court of Ventura County. Bruce A. Thompson, Judge. Reversed.

Carolyn Froeberg, under appointment by the Court of Appeal, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Norman H. Sokolow and Howard J. Schwab, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant was accused of murder in Kern County. After denial of his motion to suppress evidence, venue was transferred to Ventura County. A jury found him guilty of second degree murder. He appeals from the judgment.

Frances Brown and her husband attended evening classes at Bakersfield College. On November 15 she died of hemorrhage and cerebral laceration due to blunt force trauma with skull fracture by the hand of defendant.

About 6 p.m. Frances left her husband studying in their van parked in the college parking lot to attend a class. Shortly after 6 p.m. a student observed Frances carrying her books walk in the parking lot followed about 20 feet behind by defendant carrying a metal table leg with which he was poking the ground while he walked. Later her husband in the van saw Frances return to the parking lot followed by a man about 6 feet behind; when he looked up again he heard a thud and saw her hit the ground and bounce, then saw defendant bend over her, pick her up and try to drag her toward another car; he got out of the van and briefly pursued defendant who ran away; Frances was unconscious and died soon thereafter in a hospital. Her books, purse and keys were strewn about; a metal table leg was on the ground.[1]

Defendant, who fit the description of the suspect, was arrested by police on the campus at 6:20 p.m.; fresh splattered blood was on his hands and shoes; his fingerprints were on the table leg. He gave written consent to search his car. A letterman's jacket was found in the trunk of the car; a description of the clothes worn by the suspect included a letterman's jacket. Tests showed that blood taken from the defendant's hands and his jacket, was not consistent with his blood type; blood on the metal table leg and jacket was consistent with that of Frances. A "TMDT" (metal detection) test indicated traces of steel in his right hand. After having been given his *Miranda* rights and waived the same, defendant made a confession

[1] This table leg was identified by the student as the same one he earlier had seen defendant carrying while following Frances.

which was received in evidence.

In his testimony[2] defendant attempted to establish self defense.

Appellant's primary contention is that his confession was obtained in violation of his *Miranda* rights. The following is part of the evidence adduced on the section 1538.5 motion in Bakersfield. Defendant was arrested on campus and transported to the station. He signed a written consent to a search of his car. He was in custody about three hours before being given his constitutional rights. During this time Officer Ennis talked with him about school; no question was asked concerning the offense; he only wanted to engage in conversation and not ask questions; in a case of major significance it was departmental policy that detectives conduct all investigation other than preliminary investigation at the scene; inasmuch as Officer Ennis did not intend to ask any questions, he did not advise defendant of his *Miranda* rights; after about two hours defendant asked Officer Ennis if he could telephone his mother; having determined from defendant's driver's license that he was 19 years of age, he asked

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[2]Defendant testified that he thought Frances looked "appealing," so he decided to try to "socialize" with her; she rebuffed him when he approached her, and he loitered around while she walked away; he became curious why she did that; he had a table leg which he was using batting "paper and stuff," followed her, caught up with her and asked her why she had turned from him; she replied "Because you Niggers are dirty and low down and if you don't get your black ass away from me I am going to blow your head off"; she reached for her purse and he thought she was reaching for a weapon; he saw something shiny in her hand, he tried to hit her in the back with the table leg, but she moved and bent her legs and the table leg struck her head; she fell; he knew he could not just leave her there, so he picked her up to see what was wrong with her and a man chased him; he returned to his car and put the jacket in the trunk then returned to the campus.

defendant to wait until the detectives arrived. Officer Ennis knew defendant's brother and friends, and his wife was one of defendant's former teachers; because defendant was sweating profusely and appeared extremely nervous, he conversed with defendant about mutual acquaintances and knowledge in order to relax him.

Detective Singleton arrived at 10:10 p.m. and advised defendant of his *Miranda* rights which he said he understood and waived, and said he would make a statement. Detective Singleton interviewed defendant for an hour during which he denied committing the offense; however, he "got the impression that [defendant] did want to make a statement regarding the actual facts of the assault. But he was for some reason or other, uneasy."; defendant then asked to talk with his mother; a telephone call was made and defendant talked with her two or three minutes; defendant then told Detective Singleton he wanted to have his mother present before he made any statement. As to what occurred next, Detective Singleton testified "And afterwards, we went back to the room; talked a little longer, and I asked him if he would make a statement if it was tape recorded; therefore,there could be no way that we could indicate in the report other than what he stated to us. . . . I asked if he would go ahead and make a statement without his mother there, if we tape recorded it, and he indicated he would. . . . I suggested it [that the second interview be taped] to him and he said he wished it taped."

On cross-examination Detective Singleton testified that defendant said he wanted to place a call to his mother, "That's when we broke . . . It is not that he didn't want to talk to me. He did not want to make a statement regarding the actual facts of the assault without talking to his mother."; however, after the phone call defendant told

him he wanted to have is mother present *before* he made any statement; they returned to the interview room waiting for her to arrive, and he (Detective Singleton) "suggested that he might not want to say something in her presence. He might feel uncomfortable, but if we put it on tape, then there would be no question as to what his statement was."; he got the "impression" that defendant wanted his mother present *when* he gave a statement but could not recall if he so stated; it was he [Detective Singleton] who suggested to defendant that he make a tape recording instead of having his mother present; although defendant's mother was at the station at the time defendant gave his confession, he neither saw nor talked to her until he finished.

The court denied the motion stating, "I can't find anything in the evidence produced that would indicate to me that there is in fact a violation of *Miranda* in this case." This court is not confronted with any conflict in the evidence relative to the taping of defendant's confession. Thus it is our duty to examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was properly found. (*People v. McClary,* 20 Cal.3d 218, 229.)

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." (*Miranda v. Arizona* (1966) 384

U.S. 436, 473-474 [16 L.Ed.2d 694, 86 S.Ct. 1602].) We are compelled under *Miranda* and the holdings of its California progeny (*People v. Fioritto*, 68 Cal.2d 714; *People v. Ireland,* 70 Cal.2d 522; *People v. Randall,* 1 Cal.3d 948; *People v. Burton,* 6 Cal.3d 375; *People v. Carr,* 8 Cal.3d 287; *People v. Superior Court (Keithley)* 13 Cal.3d 406; *People v. Superior Court (Zolnay)* 15 Cal.3d 729; *People v. Disbrow,* 16 Cal.3d 101; *People v. Enriquez,* 19 Cal.3d 221; *People v. McClary,* 20 Cal.3d 218; *People v. Pettingill,* 21 Cal.3d 231), to hold, and we do so reluctantly, that the confession was inadmissible and mandates reversal of the judgment.

First, in the context of the events surrounding the confession the only reasonable interpretation of defendant's assertion to Detective Singleton that he wanted to have his mother present before he made any statement, is that he thereby invoked his privilege against self-incrimination and wished to remain silent. While defendant did not expressly say he did not want to talk any more to the detectives, *Miranda* teaches that if a suspect "indicates in any manner" that he wishes not to proceed with the interview, no matter the reason, the interrogation must cease. *Miranda* rights are deemed asserted when "conduct reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police *at that time.*" (*People v. Randall,* 1 Cal.3d 948, 956, fn. omitted; original emphasis.) He was not required to use any particular form of words or conduct to indicate his unwillingness at that time to continue with the interrogation. (*People v. Superior Court (Keithley)* 13 Cal.3d 406, 410; *People v. Randall,* 1 Cal.3d 948, 955; *People v. Burton,* 6 Cal.3d 375, 381-

388)[3] or to give any explanation or reason therefor. (*People v. Marshall,* 41 Cal. App.3d 129, 134.) Conduct inconsistent with a present unwillingness to discuss his case fully and completely with police may be manifested, as here, by a request for consultation with noncounsel parties. (*People v. Parker,* 45 Cal. App.3d 24, 29.) Although Detective Singleton during his first discussion with defendant got the impression he did want to make a statement, defendant's statement to him that he wanted to have his mother present before he made any statement shows an outright unwillingness at that time to proceed with the interview. In *People v. Parker*, 45 Cal. App.3d 24, defendant was advised of his *Miranda* rights by Denver police; he said he would " 'just wait.' " Three days later Los Angeles police advised him of his *Miranda* rights; defendant said he wanted to see a psychiatrist. One was obtained and defendant conversed with him for 10 minutes; the doctor gave defendant no advice but told the officers "he had 'this boy ready to make his confession.' " (P. 28.) Police then asked him if he was willing to discuss his role in the murder, defendant said he was, and later confessed. Relying on *People v. Randall,* 1 Cal.3d 948, this court said that defendant's response to the original *Miranda* warning and his subsequent request to see a psychiatrist prior to responding to the reinstituted questioning by police, are both inconsistent with a present willingness to discuss the case freely at the time of the questioning. (P. 29.)

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[3]Appellant who was 19 years old at the time has limited his claim that his confession was not admissible to denial of his right to remain silent, thus we do not have the problem of a minor's right to have his parents present during interrogation under *People v. Burton,* 6 Cal.3d 375, to which Attorney General devoted a good portion of respondent's brief.

Second, the interview did not cease after defendant asserted his privilege. Detective Singleton conceded this in his testimony on cross-examination.[4] Once having invoked his right to remain silent, defendant was entitled to have all interrogation efforts come to an end (*People v. Superior Court (Keithley)* 13 Cal.3d 406, 410) and any efforts of the detectives to convince him "to communicate with" them immediately cease. (*People v. McClary*, 20 Cal.3d 218, 226.) The accepted rule in California based on *Miranda* is that "once a suspect indicates he wishes to assert his privilege against self-incrimination, it is unlawful for the police to continue to renew the interrogation and any statement elicited thereafter is inadmissible. [Citations.]" (*People v. Pettingill,* 21 Cal. 3d 231, 240-241.)

Third, the resumption of the interview resulting in defendant's confession was initiated solely by and at the suggestion and urging of Detective Singleton despite defendant's invocation of his right to remain silent. The court in *People v. Randall*, 1 Cal.3d 948 distinguishes two situations in which a confession is made after a cessation of questioning in response to invocation of the right to remain silent. "(1) a change of mind on the part of the defendant prompted by the advice of counsel, his own psychological make-up, or similar facts; [and] (2) a change of mind prompted by continued interrogation and efforts to convince the defendant to communicate with the

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[4]"Q [DEFENSE COUNSEL] And after the phone call, Mr. Level told you that he wanted to have his mother present before he made any statement? [¶] A [DETECTIVE SINGLETON] Yes, sir. [¶] Q And you did not stop questioning him? [¶] A No, sir." When asked how long he had defendant in his custody before the statements were tape-recorded, Detective Singleton answered "When we started the interview at 10:10, and we broke for the phone call, and then we started again."

officers. The former is not proscribed by *Miranda*, nor by our application of its teaching in *Fioritto* and *Ireland*. . . . 'Volunteered statements of any kind are not barred by the Fifth Amendment. . . . Not only did we affirm our adherence to this principle in the *Fioritto* case, but we also and here indicated that even a defendant in *custody* might make statements admissible under *Miranda* if it were shown that such statements were the result of the defendant's own initiative and did not arise in context of custodial interrogation.' " (P. 956, fn. 7, original emphasis.) Thus, a suspect who has asserted his rights and prevented further lawful interrogation nonetheless retains the option, thereafter, *voluntarily* to initiate a confession, but as stated in *Randall* and articulated in *People v. McClary*, 20 Cal.3d 218 at pages 226-227: " 'a change of mind prompted by continued interrogation and efforts to convince the defendant to communicate with the officers' cannot be considered a voluntary, self-initiated conversation." We cannot fairly say on the facts here that defendant in any manner voluntarily initiated either the second interview or the confession that resulted from it. The record shows that Detective Singleton continued interrogation; asked, "And you did not stop questioning him?", he answered "No, sir." Clearly this change of mind was prompted by the suggetions and queries of Detective Singleton. As an example Detective Singleton testified "I asked him if he would make a statement if it was tape recorded"; "I asked if he would go ahead and make a statement without his mother there, if we tape recorded it." and he (Singleton) "suggested that he might not want to say something in her presence. He might feel uncomfortable. . . ." Based on Detective Singleton's testimony that after defendant told him he wanted to have his mother present before he made any statement he asked defendant if he would make a statement if it was tape-recorded and if he would do so without his mother being

present, and suggested to defendant he might not want to tell the facts in her presence because he might feel uncomfortable, the dissent makes a distinction between further "questioning the defendant about the crime for which he was arrested." and making "statements [that] pertained only to the *MANNER* in which the interview *could be completed,*" and concludes that Detective Singleton merely suggested the manner of completing the interview by way of tape recording without his mother being present, and defendant "of his own free will decided" to do this. (Original emphasis.) But such view ignores the obvious fact that while the questions referred to the method of continuing the questioning, implicit in Detective Singleton's questions is the misplaced and unsupported assumption that defendant wished to speak to the officers about the crime; ignores the teaching of *People v. Randall,* 1 Cal.3d 948, 956, fn. 7 and *People v. McClary,* 20 Cal.3d 218, 227-228 that a change of mind and resulting confession prompted by "efforts to convince the defendant to communicate with the officers," which this clearly is, cannot be considered a voluntary self-initiated confession; and ignores the concept that further talk or questioning by police which is a subtle attempt to subvert or avoid a defendant's assertion of his *Miranda* rights is prohibited. (*People v. Munoz*, 83 Cal. App.3d 993, 995.) In posing his questions, "if he would make a statement if. . ." and "if he would go ahead and make a statement without his mother there, if . . ." and making his suggestion to defendant that the statement be tape-recorded — pertaining to "the *MANNER* in which the interview *could be completed,*" which Detective Singleton had no right at that time to reinstitute or complete — he clearly bypassed or avoided defendant's request to have his mother present before he made a statement. (Original emphasis.) In *People v. Munoz*, 83 Cal. App.3d 993, defendant said

maybe he should talk to his attorney whereupon Detective Narramore said that was his business and he could if he wanted to, but wished to explain to him why he was there and to tell him what information he had; defendant told him to go ahead; Narramore then told him what he knew about the robbery, read his *Miranda* rights and asked if he wished to talk; defendant answered in the affirmative and confessed. Although *Munoz* involves an invocation of the right to counsel, the court said at page 996: "Munoz's remark, while ambiguous can be construed as an invocation of his right to speak to an attorney before questioning. When Narramore told Munoz he wanted to tell him what information he had, he avoided dealing with Munoz's request. His action served to 'soften' up Munoz, as he must have intended it to, thus subverting Munoz's not too forcefully expressed wish to see his named attorney."

The foregoing line of California authority leaves us no alternative but to conclude that defendant's confession was inadmissible, and the trial court erred in denying his motion to suppress. We have no more wish to reverse a judgment which, without the confession, is supported by overwhelming evidence of defendant's guilt, than the dissent; however, that error per se requires that we reverse the judgment of conviction here. (*People v. Fioritto,* 68 Cal.2d 714, 720.) Unfortunately final disposition of the case will be delayed and further expenditure of public funds will result because of the necessity of retrial.

The judgment is reversed.

CERTIFIED FOR PUBLICATION

LILLIE, Acting P.J.

I concur:

EPSTEIN, J.*

*Assigned by the Chairperson of the Judicial Council.

DISSENTING OPINION OF HANSON, J.

I respectfully dissent. The majority opinion reverses the judgment of conviction in the instant case on the ground that the confession of defendant admitted into evidence which was on tape recorded by Officer Bradley E. Singleton following the murder of the victim on November 15, 1977, violated defendant's *Miranda* [1] rights and the holdings of its California progeny and is therefore inadmissible mandating a reversal per se.

I agree with the majority opinion that *if* the taped confession was obtained under conditions violative of defendant's *Miranda* rights under binding case law authority reversal is mandated (but see my concurring opinion reversing a judgment of conviction in *In re Roland K.* (1978) 82 Cal. App.295, 302-303) even though the error, as in the instant case, was harmless beyond a reasonable doubt.[2]

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[1] *Miranda v. Arizona* (1966) 384 U.S. 438.

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[2] Uncontradicted testimony at the trial of the case at bench disclosed that at about 6 p.m. on November 15, 1977, the female victim, Frances Lorine Brown (age 24), was bludgeoned to death in a parking lot at the Bakersfield College where she was attending evening classes in order to obtain her teaching credentials. A metal table leg was found near her body. A forensic pathologist who performed the autopsy for the coroner's office testified that she died of "skull fracture with laceration and contusion of the brain itself." The lethal blow was delivered to the back of her head and she bled profusely. Her husband who was sitting in a vehicle nearby saw his wife (the victim) walking toward him smiling and a man followed her. Her husband looked away momentarily to place some books back of the seat and then heard a thud and when he looked around he saw his wife bounce on the ground. He immediately exited his vehicle and saw the assailant dragging his wife toward another car. He yelled and the assailant dropped his wife and ran. Witnesses in the area gave the police, who were immediately called to the scene, a description of the assailant and said he was wearing a letterman's jacket, maroon in

However, I disagree that the record shows that defendant's *Miranda* rights were violated. I do not construe either the *Miranda* case or any of its California progeny to require a reversal under the unique facts of the instant case. I cannot say as a matter of law that the superior court fanned out on three separate occasions [3] and erred in denying defendant's motion to suppress the tape recording in question. I would affirm the judgment of conviction.

(footnote continued from previous page)

color with white sleeves. Within 20 minutes of the assault, an officer who was canvassing the campus for a suspect stopped the defendant because of his suspicious behavior and because he met the general description of the assailant supplied by witnesses. Defendant had fresh blood on his hands and spattered on his white tennis shoes. Defendant gave the police permission to search his car and they recovered a letterman's jacket with fresh blood on the sleeves. Expert testimony at the trial established that defendant's fingerprint was on the metal table leg used to bludgeon the victim and that traces of the metal from the table leg had transferred to defendant's hands. Expert testimony also established that the blood on defendant's tennis shoes and jacket was the same type as that of the deceased victim but not that of the defendant.

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[3] The admission of the tape recording in question was either sought to be suppressed or objected to on three separate occasions during the more than a year the case was in the trial court and in each instance the request was denied.

The *first* occasion was at defendant's motion to suppress the tape pursuant to Penal Code section 1538.5 before Judge P.R. Borton in the Kern County Superior Court at the February 21 and 28, 1978, hearing. The court denied the motion. This is the hearing which is before this court on appeal.

The *second* occasion was when defense counsel renewed the motion to suppress the tape before Judge Bruce A. Thompson, the trial judge, following the change of venue to Ventura County. The motion was submitted on the transcript of the February 1978 hearing and was again denied.

The *third* occasion was following the trial when defense counsel raised the issue again as one of his grounds supporting the defense motion for a new trial. Judge Thompson denied the motion for a new trial.

THE CASE

The central and controlling issue in this case is whether or not the defendant's tape recorded confession was admissible as it was obtained after he requested that his mother be present during the taping. The only evidence that bears on this issue for purposes of appeal is the testimony of one witness, Officer Singleton, who testified at the hearing on defendant's motion to suppress the tape recording which was conducted on February 21, 1978, in Bakersfield (Kern County). The defendant was present and represented by counsel but did not testify.

The record shows that neither Officer Dennis Armour, who apprehended the defendant in the quad area of the Bakersfield College campus shortly after the murder, nor Officer Robert Anthony Ennis, who transported defendant to the Bakersfield police station and stayed with him until the detective in charge arrived, questioned the defendant about the facts of the offense. It was the department policy that the detectives conduct all investigations. Officer Singleton, a detective with 14 years experience, who was assigned to the case conducted the interview. Set out *haec verba* in footnote 4 below are the portions of Officer Singleton's testimony at the hearing on

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[4]Following is the relevant testimony of Officer Singleton at the defendant's motion to suppress the taped confession in question:

"[DIRECT EXAMINATION]

"[BY MR. McNUTT (deputy district attorney)]

"Q Prior to conducting an interview with the suspect, were you aware of the fact he was under arrest?

"A Yes, sir.

"Q Was your interview with him relating to a possible homicide at B.C.?

"A It was a homicide at that time.

the 1538.5 motion relevant to the issue before us. This testimony appears in only 9 pages of the total of about 2,000 pages of reporter's transcript comprising the complete record on appeal.

(footnote continued from previous page)

"Q It had been confirmed as a homicide?

"A Yes, sir.

"Q *Prior to conducting an interview with the defendant, did you advise him of his constitutional rights per Miranda*?

"A *Yes, sir.*

"Q And for that purpose, did you utilize any artificial devices?

"A I used a card provided by the Police Department.

"Q And do you have that same card with you here today?

"A Yes, sir.

"Q *Would you recite on the record, please, exactly what you related to Mr. Level on November 15th, prior to conducting your interview with him?*

"A *Yes. 'Number one, you have the right to remain silent'. And I asked him if he understood what that meant. 'Yes.' 'Two, anything you say can and will be used against you in court'. And I asked him if he understood those. And he stated he did. 'Three, you have the right to consult with a lawyer before answering any questions and have a lawyer with you during any questioning'. And I asked him if he understood that, and he said, 'Yes.' The fourth one, 'If you cannot afford a lawyer, one will be provided free of cost, if you want one'. And I asked him if he understood that, and he said, 'Yes'. And I asked, 'Having these rights in mind, do you want to go ahead and make a statement to Detective Horton and myself regarding your involvement, if any, in the assault?', and he said he would.*

"Q Did you indicate to him at that time that the victim had died?

"A Yes, sir.

"Q Was he advised of the fact he was under arrest as a suspect in the killing of that victim?

"A Yes, sir.

"Q Was this Mirandazation on tape?

"A No, sir.

(footnote continued from previous page)

"Q Did you subsequently to giving him his rights and obtaining the waiver, interview him regarding the possible homicide?

"A Yes, sir.

"Q And was that on tape?

"A No, sir.

"Q For what length of time did you conduct an interview with him regarding the homicide?

"A It was approximately one hour.

"Q Subsequent to that interview, did you conduct another interview?

"A Yes.

"Q Was that interview on tape?

"A Yes, sir.

"Q How soon after the first interview did the second interview take place?

"A It commenced, I believe, at 11:40 p.m.

"Q On the same date?

"Q Yes, sir.

"Q Why the break between the first interview and the second interview?

"A We initially got the initial statement from him, and then at one point he requested to talk with his mother. And we allowed him to do that; to make a phone call to his mother.

"Q *Did he at any time indicate that he did not want to talk to you any more or that he wanted an attorney?*

"A *No, sir.*

"Q Did he in fact talk with his mother?

"Q Yes, sir.

"Q How soon after that was it you conducted the second interview on tape?

"A It was shortly after his conversation. We were waiting for her to come down to the police station. Before he wanted to make the phone

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call to his mother, I got the impression that he did want to make a statement regarding the actual facts of the assault. But he was for some reason or other, uneasy. And so we let him make the phone call to his mother. And afterwards, we went back to the room, talked a little longer, and I asked him if he would make a statement if it was tape recorded; therefore, there could be no way that we could indicate in the report other than what he stated to us.

"Q And who indicated that this second interview should be on tape?

"A I asked if he would go ahead and make a statement without his mother there, if we tape recorded it, and he indicated he would.

"Q Was he in effect asking that the second interview be taped?

"A Yes.

"MR. KING [deputy public defender]: Objection, your Honor, as calling for a conclusion.

"THE COURT: Sustained.

"Q (By Mr. McNutt) *Did he ask that the second interview be taped?*

"A *I suggested it to him, and he said he wished it taped.*

"MR. McNUTT: Your Honor, and Counsel, I don't believe it's necessary for the purpose of the proceedings to go into the content of the conversation. I will offer a stipulation that the officer would testify to the content of the conversation as contained in the officer's report and the preliminary transcript, and the second interview was taped. Unless Counsel for some reason wants to go into it at this time, that is. I would also stipulated [*sic*] there is relevant, and material, and possibly incriminating evidence contained in those statements.

"MR. KING: I think in this hearing, your Honor, that the record should be complete. I am not prepared to stipulate at this time.

"THE COURT: All right, Mr. McNutt.

"MR. McNUTT: With the Court's permission then, I will stop my direct at this point. I simply wanted to establish the Miranda warning. And Counsel can get as much as he wants in getting out testimony.

"THE COURT: All right.

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"CROSS-EXAMINATION

"BY MR. KING:

"Q Mr. Singleton, prior to interviewing Mr. Level, did you have any conversation with Mr. Ennis?

"A I believe I went into the lab twice — once when I got back to the station from being out in the field, and I just briefly looked in the lab, and observed Mr. Level and Mr. Ennis, and told them I would get to them as soon as possible. And then after my interview with the victim's husband and two other individuals, I again went in, and told them I would be just a few more minutes. But I had no direct conversation with Mr. Ennis.

"Q Did you talk to Mr. Ennis regarding the search of the car?

"A I had no idea there was a car at the college.

"Q When did you first learn about a car being involved in this case?

"A It was after one of the interviews — one of the three interviews — I don't know which one — I learned that they had found a jacket, and that there was blood on the jacket.

"Q Do you know what time that was?

"A No, I have no idea, sir.

"Q Was it before you talked to Mr. Level?

"A Oh, yes, sir.

"Q And whom did you learn or obtain that information from?

"A I do not recall, but it was not from Mr. Ennis.

"Q Was it Mr. Foy?

"A I don't belive I saw Mr. Foy that night.

"Q You were talking about three interviews? Who were the subjects in those interviews?

"A The victim's husband, Mr. Brown; Bill Pedeton; and a Kirk Brown.

"Q And where did these interviews take place?

"A At the Police Department.

"Q And these were the possible witnesses to the offense?

(footnote continued from previous page)

"A That is correct, sir.

"Q And when you interviewed them, you used a tape recording of their conversation?

"A That is correct, sir.

"Q When you interviewed Mr. Level, you did not use a tape recorder? Is that right?

"A That is correct, sir.

"Q And where was the tape recorder at the time that you had previously used for the three witnesses?

"A Either in my office or in the — I believe it was in my office.

"Q Was there anything defective with that tape recorder?

"A No, sir.

"Q Was there any particular reason that you did not use the tape recorder when you talked to Mr. Level?

"A Normally, it makes individuals very uneasy, and they won't talk, or they feel hesitant for some reason, and it intimidates them.

"Q You did not feel that was true, however, when you interviewed the three witnesses?

"A No, because they are not suspects.

"Q Now, in the first statement that you obtained from Mr. Level, did you indicate to you he wanted to phone his mother?

"A It was towards the end. That's when we broke when he wanted to place a phone call to his mother.

"Q And he told you that he did not want to talk to you until he had talked to his mother?

"A *It is not that he didn't want to talk to me. He did not want to make a statement regarding the actual facts of the assault without talking to his mother.*

"Q *And you allowed him to make the phone call?*

"A *That is correct.*

"Q Did you monitor that phone call?

"A No, sir.

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"Q Did any officer, to your knowledge, monitor that phone call?

"A No, sir.

"Q How long did the phone call last?

"A Two or three minutes.

"Q And what time was it made?

"A Sometime between 11:10 and, I would say, maybe 11:15 or 11:20.

"Q And after the phone call, Mr. Level told you that he wanted to have his mother present before he made any statement?

"A Yes, sir.

"Q *And you did not stop questioning him?*

"A *No, sir. We were back in the interview room, waiting for her to respond to the station, and we were just sitting there, talking. And I SUGGESTED that he might not want to say something in her presence. He might feel uncomfortable, but if we put it on tape, then there would be no question as to what his statement was.*

"Q Did you tell Mr. Level that if he wanted to make the taped statement, that you would show it to his mother and let her listen to it when she arrived?

"A I don't recall saying that.

"Q *Mr. Level's statement to you was he wanted to have his mother present WHEN he gave you a statement?*

"A *That's the impression I got, yes, sir.*

"Q Did he say that?

"A I don't recall.

"Q *Do you recall testifying at the preliminary hearing?*

"A *Yes, sir.*

"Q *Do you recall being questioned that when Mrs. Level came down to the station, he wanted to talk to her before he gave a statement? Do you recall being asked that?*

"A *Yes.*

"Q *And do you recall answering, 'He (indicating Mr. Level) would like to have her present WHILE he was making the statement'?*

In defendant's statement tape recorded of Officer Singleton which the defense sought to have suppressed and which was admitted into evidence and played to the jury during the trial, he said that he was at the Bakersfield College campus looking for a friend named Mylo and picked up a metal table leg which he found on campus; that while he was using it to hit at a piece of paper and walking toward the parking lot he saw the victim; that he started to follow her and said: "Hey. Do you have a few minutes?"; that his intention was to "get any information like her

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"A *Yes, sir.*

"Q Did he tell you that?

"A I don't recall if I was told or I just got that impression.

"Q Do you recall making the answers I have read to you?

"A No, sir.

"Q MR. KING: Your Honor, may I approach the witness with the transcript of the preliminary hearing?

"THE COURT: Certainly.

"MR. KING: Page 1119, Line 25.

"THE WITNESS: He indicated he wanted to talk to her before he gave a statement. That's at Line 25?

"MR. KING: Line 27?

"A Yes, sir, that's in the transcript.

"Q *He indicated he wanted to have his mother present when he gave you a statement?*

"A *Yes, sir.*

"Q And then you *suggested* to him that he make a tape recording instead of having his mother present?

"A That's correct, sir.

"Q Did you ever indicate to him that his mother would be allowed to listen to the tape recording?

"A I don't think so." (Italics added.)

phone number of . . . "; and that the victim said: "I don't have any time for any niggers" and walked away. The defendant stated that he "got mad as hell for what she said" and hit her with the metal table leg using it "like a bat"; that when he tried to drag her away "the guy jumped out from wherever he was, he came from somewhere and ran towards me" so he dropped the victim and ran away; that he went to his car and put his letterman's jacket in the trunk because he "didn't want anybody to see the jacket"; and when he went back into campus looking for his friend Mylo he was arrested by the police officer. When asked what defendant did with the table leg, he said: "I just dropped it, left it there." When asked toward the end of the tape if "there [was] anything else that happened that we haven't asked you about?" the defendant answered, "Not that I can think of." At the end of the tape the defendant apparently confirmed that he was read his rights and that he was not promised or threatened in any way and that he gave his statement freely and voluntarily.[5]

The trial court denied defendant's motion to suppress the above taped confession and it was admitted into evidence.

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[5]Also admitted into evidence and played to the jury was another tape recording of statements made by the defendant to some visitors while he was in custody which defendant did not know was being recorded. In this statement defendant told his visitors that when he was on campus trying to find his friend Mylo was when he "saw this white bitch"; that he said to her, "Hey, you got a few minutes?"; that she turned, looked at him and said: "I don't have time for no niggers" and kept on walking; that he thought about it for a few minutes and said to himself "I'm — I'm gonna go after that bitch, why she say that, you know"; that he caught up with her in the parking lot and said to her, "Hey, why did you — why did you say that to me?"; that the "bitch" turned kind of sideways and said: "Cause all niggers are dirty and they ain't worth a damn. If you don't get your black ass away from me, I'll blow your head off"; that "the bitch went into her purse, man. She was gonna bend to go in her purse, and I ran up on the bitch and hit her, man, with — with the thing I had"; that after she fell to the ground he

DISCUSSION

"A proceeding under section 1538.5 to suppress evidence is a full hearing on the issues before the superior court sitting as finder of fact. (*People v. Superior Court (Peck)* 10 Cal. 3d 645, 649 [. . .]; *People v. West* (1970) 3 Cal. 3d 595, 602 [. . .].) The power to judge credibility of witnesses, resolve conflicts in testimony, *weigh evidence and draw factual inferences,* is vested in the trial court. *On appeal all presumptions favor proper exercise of that power, and the trial court's findings — whether express or implied — must be upheld if supported by substantial evidence. (People v. Gale* (1973) 9 Cal. 3d 788, 792 [. . .]; *People v. Lawler* (1973) 9 Cal. 3d 156, 160 [. . .].) " (*People v. Superior Court (Keithley)* (1975) 13 Cal. 3d 406, 410, italics added.)

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tried to drag "her away from out in the open" so he could see what was wrong with her because he "just figured she was out cold"; that in dragging her he got blood on his hands, white tennis shoes and jacket; and that her husband who was waiting for her jumped out of his car and ran toward him hollering "you sonofoabitch" and he ran off "trying to get away." When asked by one of the visitors if he was going to plead guilty, he said: "Hell no" and "[h]ope that I can get maybe, uh, manslaughter or hopefully a self defense case, man." He later indicated that his "mother fucking mistake — big mistake — was talking to the police."

At the trial the defendant testified substantially in accordance with what he told his visitors as noted above absent the street vernacular. In addition he told the jury that within the hour before he arrived on campus he had consumed a quarter of a pint of 151 proof Bacardi rum with Coca Cola and he and a friend between them smoked "two joints of angel dust" and that he then smoked another joint of marijuana; that just before he struck the victim with the metal table leg he "saw her hand reach toward her purse" and "saw something in her hand, some shiny object"; and that he intended to hit her in the back but "because she ducked" he hit her in the head.

In accordance with and in harmony with the foregoing test on review requiring that we view the evidence in a light most favorable to the trial court's ruling, I would hold that if Officer Singleton's testimony, set forth in footnote 4, *ante*, considered in its complete context can be reasonably construed and interpreted by the trial court in a fashion to support its finding that Officer Singleton did not in fact violate the defendant's *Miranda* rights, its ruling must be upheld. My independent analysis of Officer Singleton's testimony and the "factual inferences" to be drawn therefrom leads me to the conclusion that defendant's *Miranda* rights were not violated. My reasoning follows:

At the outset it is important to point out what this case is not. It is not one in which a *minor* has requested a parent. In *People v. Burton* (1971) 6 Cal. 3d 375, the Supreme Court reversed a first degree murder conviction because a confession was made after the defendant, a 16-year-old, requested to see his parents and his request was flatly refused. The court said at page 382; "For minors, it would seem that the desire for help naturally manifests in a request for parents. It would certainly severely restrict the 'protective devices' required by *Miranda* in cases where the suspects are minors if the only call for help which is to be deemed an invocation of the privilege is the call for an attorney." In the instant case the evidence is uncontradicted that the *defendant* was not a minor but *was an adult* having reached his majority, being 19 years old at the time of the murder. He had shed the protective cocoon the law affords to minors and assumed the responsibilities and obligations of an adult.

Nor does the instant case involve the procedures to be followed if the person in custody asks to consult with a lawyer, since the record is clear that defendant made no such request at any time. The *Miranda* court distin-

guished between the procedural safeguards triggered by a request to remain silent and a request for an attorney by directing that "the interrogation must cease until an attorney is present" *only* "[i]f the individual states that he wants an attorney." (384 U.S. at p. 474.)

The key issue in the instant case therefore narrows down to the question as to whether or not there was violation of that portion of the *Miranda* decision pertaining to the procedural safeguards set in motion once a defendant expresses the desire to remain silent. The *Miranda* court said at pages 473-474; "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . . " But the court also said at page 444: "[By] custodial *interrogation,* we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Italics added; see also *People v. Fioritto* (1968) 68 Cal. 2d 714, 718.)

In the case at bench a fair interpretation of Officer Singleton's testimony considered as a whole (see fn. 4, *ante*) shows that this adult defendant waived his *Miranda* rights and during the following interview which was not tape recorded requested and was allowed permission to call his mother. He then requested that his mother be present when the interview continued. While they were in *recess* awaiting the mother, *Officer Singleton did not in fact continue QUESTIONING the defendant about the crime for which he was arrested.* The majority opinion apparently places great emphasis on the two word answer of Officer Singleton when he said "No, sir" when asked if he had stopped questioning the defendant while waiting for defendant's mother. A careful reading of the balance of the

answer (see fn. 4, *ante,* p. 9) shows that in fact they "were just sitting there, talking," and that the officer's statements pertained only to the *MANNER* in which the interview *could be completed.* The officer merely *SUGGESTED* that if the defendant's statement might prove embarrassing to him in the presence of his mother it could be tape recorded which would eliminate any doubt as to the accuracy of his statement at a later time. The defendant of his own free will decided to complete the interview in that manner without his mother present.

In my opinion the foregoing does not constitute a *Miranda* violation. At no time after waiving his *Miranda* rights did defendant say he wished to remain silent. Furthermore, there was no rubber hose, no hobnailed boot, no threats, no promises, no coercion, and no compulsion, subtle or otherwise, which overcame the defendant's free choice to make a statement which he indicated he would do anyway after his mother arrived. To hold that *Miranda* applies to the facts of this case would extend the *Miranda* safeguards to absurd limits and place wholly irrational obstacles to legitimate police investigate activity. It would also result in depriving a defendant of an opportunity to make an informed and intelligent assessment of his interests and thus "imprison [him] in his privileges" (*Adams v. United States* ex rel. *McCann* (1942) 317 U.S. 269, 280) and completely disregard" 'that respect for the individual which is the lifeblood of the law.' " (*Faretta v. California* (1975) 422 U.S. 806, 834.)

The majority opinion cites as authority *Miranda's* California progeny, namely the California Supreme Court cases of *People v. Fioritto, supra,* 68 Cal. 2d 714; *People v. Ireland* (1969) 70 Cal. 2d 522; *People v. Randall* (1971) 1 Cal. 3d 948; *People v. Burton, supra,* 6 Cal. 3d 375; *People v. Carr* (1972) 8 Cal. 3d 287; *People v.*

Superior Court (Keithley), supra, 13 Cal. 3d 406; *People v. Superior Court (Zolnay)* (1975) 15 Cal. 3d 729; *People v. Disbrow* (1976) 16 Cal. 3d 101; *People v. Enriquez* (1977) 19 Cal. 3d 221; *People v. McClary* (1977) 20 Cal. 3d 218; and *People v. Pettingill* (1978) 21 Cal. 3d 231; and the appellate court cases of *People v. Marshall* (1974) 41 Cal. App.3d 129; *People v. Parker* (1975) 45 Cal. App.3d 24; and *People v. Munoz* (1978) 83 Cal. App.3d 993.

In no way do the hard factual circumstances of the above cases remotely square with the unique factual circumstances of the case at bench. The factual distinctions in the California cases cited in the majority opinion from those of the instant case are glaring.

In the case at bench the defendant after he was *initially* given the *Miranda* warning acknowledged he understood his rights and agreed to speak and did not ask for an attorney and at no time vocally or otherwise reasserted his *Miranda* rights. In *Ireland, Randall, Zolnay, Disbrow,* and *McClary* after the giving of the initial *Miranda* warning the defendants in each case asked for an attorney and in *Fioritto, Keithley, Disbrow* and *Pettingill* the defendants stated they wished to remain silent. In *Ireland, Randall, Keithley* and *Pettingill* the defendants were confronted with the repeated giving of the *Miranda* until agreed to talk after first asserting those rights. Here, also unlike in *Fioritto,* where the defendant was confronted by accomplices who had already confessed after the defendant had refused to speak, the defendant herein before the interview started by Officer Singleton knew that the police saw the fresh blood on his hands and tennis shoes; and that he had previously voluntarily consented to have the officers search his car where he had placed the letterman's jacket with fresh blood on its sleeves and was advised that

the female he had clubbed with the metal table leg had died. Here, at no time including during the *recess* did the defendant reassert his *Miranda* rights and ask for an attorney as in *Enriquez*. Here, at no time was the defendant pressured or threatened as in *Zolnay* and *McClary* nor was he given false assurances that his statement would not be used in court as in *Disbrow*. Here, the defendant was a 19-year-old adult who merely asked that his mother be present during questioning, which request was never refused, unlike *Burton* where the defendant was a 16-year-old minor who asked for his father but whose request was denied.

The *Pettingill* case [6] involved nearly identical circumstances as were present in the United States Supreme

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[6] In *People v. Pettingill, supra,* 21 Cal.3d 231, the defendant pleaded guilty to two counts of burglary after the trial court denied his motion to suppress evidence of his confession, together with certain physical evidence found in a search to which he had consented in the course of the confession. The record indicated that the arresting police officer had read defendant his constitutional rights at the scene of the arrest, had asked defendant if he wanted to talk to him to which defendant responded in the negative so he was asked no more questions at that time. Two hours later at the police station, the same police officer again advised defendant of his constitutional rights, asked him if he wished to talk to him about the burglary for which he had been arrested, and again defendant declined after which the officer had no further discussion with him. More than 60 hours later a police detective from another county and city questioned defendant about four unrelated burglaries in the other county. The questioning took place at a location different from the location of the prior questioning, and the police detective gave defendant his full and complete warnings as to his constitutional rights before he was questioned. It was during this interrogation that defendant waived his privilege against self-incrimination and confessed to the four burglaries. The detective did not resume interrogation about the burglary for which defendant had been arrested. The state Supreme Court reversed, holding that defendant's confession was inadmissible under the privilege against self-incrimination.

Court case of *Michigan v. Mosley* (1975) 423 U.S. 96.[7] The majority in *Pettingill* (Clark and Richardson, JJ., dis.) employed its "independent state grounds" doctrine and declined to follow the United States Supreme Court decision in *Mosley* pertaining to *Miranda* rights. In so doing the *Pettingill* court described the sequence of events which have *typically* arisen since *Miranda.* The *Pettingill* court said at page 238: "Of course, because no warnings of any kind were given in *Miranda,* the decision did not actually adjudicate the precise issue now before us. That issue, which has often been presented to the courts since *Miranda,* typically arises from the following sequence of events: the police give the suspect the *Miranda* warnings and seek to question him, but he successfully invokes his right to remain silent; rather than promptly release or arraign him, however, the police continue to hold him in custody; thereafter the police again give him the *Miranda* warnings and renew the interrogation, and this time he confesses. There are variations on this theme: there may be more than two attempts at interrogation; the interval between interrogations may be long or short; at the start of the second or subsequent interrogation the police may or may not confront the suspect with

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[7] In *Mosley* the defendant had been arrested in connection with certain robberies and a detective gave him the *Miranda* warnings. Defendant declined to discuss the robberies, whereupon the detective ceased the interrogation. More than two hours later, after giving *Miranda* warnings, another detective questioned defendant solely about an unrelated murder. Defendant made an inculpatory statement, which was later used in his trial for murder, which resulted in his conviction. The appellate court reversed on the ground that *Miranda* mandated a cessation of all interrogation after defendant had declined to answer the first detective's questions. The United States Supreme Court held that the admission in evidence of defendant's incriminating statement did not violate *Miranda* principles.

additional evidence or statements of his accomplices; and the later questioning may be conducted by a different police officer, in a differenct location, and deal with a different crime. Nevertheless, in a long line of decisions this court has consistently held that a statement taken from the suspect in any of these circumstances is inadmissible because in violation of the principles of *Miranda* and the privilege against self-incrimination of the California Constitution."

Clearly the case at bench does not fit the mold of either the fact of the *Pettingill* case or the circumstances of the *typical* cases or the variation thereof described above in *Pettingill* in which the *Miranda* issue arises.

Nor does the instant case fit the mold of the appellate court cases of *People v. Marshall, supra,* 41 Cal. App.3d 129; *People v. Parker, supra,* 45 Cal. App.3d 24; and *People v. Munoz, supra,* 83 Cal. App.3d 993; cited in the majority opinion.

In *Marshall* (in which I particiated and concurred) during the course of questioning of a 17-year-old youth regarding the murder of his stepfather, the officer asked if he wanted "to go over the parts [he] left out?" and the defendant answered "no" twice and a third time said, "I just don't want to." We held that the answers amounted to a clear invocation of his Fifth Amendment privilege to remain silent foreclosing further interrogation. In the instant case the defendant made no such statements. To the contrary the testimony of Officer Singleton shows that the defendant who had previously waived his *Miranda* rights intended to complete the interview but wanted his mother present. During the recess the officer merely suggested some alternative in the manner of proceeding to which the defendant freely and voluntarily agreed without any compulsion whatsoever.

In *Parker* the defendant's conviction of first degree murder which occurred in the course of an attempted bank robbery in Los Angeles, California, was reversed. Defendant Parker was arrested in Denver, Colorado, and the Denver police read his *Miranda* rights from a printed form but rather than consenting to the waiver defendant wrote on the form in the space designated for his signature "You are in as much of the dark as I am. I'll just wait." Three days later Los Angeles Police Department officers went to Denver and read him his rights again, but defendant said he wanted to talk to "somebody." He then said the "somebody" was a prison doctor or a psychiatrist. The chief psychologist at the Denver County Jail interviewed the defendant. He noted that the defendant was "apparently under pressure, stress, and that's why he wanted to talk matters over with a psychologist or a minister and that he could not decide whether he would make a confession to the detectives or not." *Following the interview the jail house psychologist told the police that he had "this boy ready to make his confession."* The detectives without repeating the *Miranda* warning asked defendant if he wanted to discuss his role in the "attempted robbery and murder" and he said he would. In the case at bench the defendant never requested a psychiatrist or a minister nor was he interviewed by a jail house psychologist to soften him up. Here, defendant merely wanted his mother present when the interview continued after having first waived his *Miranda* rights and the officer merely suggested an alternative mode of proceeding to which defendant freely agreed.

The *Munoz* case involved a request for an attorney. The reviewing court held that the defendant's statement "Well, maybe I should talk to my attorney" although "ambiguous [could] be construed as an invocation of his right to speak

to an attorney before questioning. When Narramore [the detective] told Munoz he wanted to tell him what information he had, he avoided dealing with Munoz's request. His action served to 'soften' up Munoz, as he must have intended it to, thus subverting Munoz's not too forcefully expressed wish to see his named attorney." (83 Cal. App.3d at p. 996.) In the case at bench it is uncontradicted that defendant Level never requested an attorney and that he had already been advised of the salient facts known by Officer Singleton as previously listed herein prior to the recess.

In the case of *People v. Carr, supra,* 8 Cal.3d 287, cited as authority in the majority opinion, a jury found defendant guilty of the first degree murder of an elderly man and fixed the penalty at death. Defendant relied on the defense of diminished capacity, having stated in confessions made to a police officer that if he had not been smoking pot before the crime he probably couldn't have gotten the guts to do it. Defendant did not take the stand at trial and there was no other evidence of diminished capacity. The trial court refused to instruct as to second degree murder and voluntary manslaughter on the ground of diminished capacity, and told the jury that it could only acquit defendant or find him guilty of first degree murder. In his confessions defendant had admitted taking the decedent's wallet containing a substantial sum of money as well as a radio and a rifle and the jury was instructed, among other matters, on murder committed in the perpetration of or attempt to perpetrate robbery.

On defendant's automatic appeal, the Supreme Court in *Carr* modified the judgment so as to provide for life imprisonment rather than death and as so modified affirmed it in all other respects. No merit was found in defendant's contentions that he had not effectively waived

his rights to counsel and to remain silent before confessing, that he had later reasserted those rights, and that he had been induced to confess by the interrogating officer's promise of leniency.

The *Carr* court addressed the defendant's contention that toward the end of his taped interview the officer asked him "Would you like to quit now, Mr. Carr?" to which the defendant replied affirmatively. The officer then asked a few more questions: specifically, he asked whether the defendant had anything to add to the interview, or on his own behalf, if he understood or had any doubt that he would be charged with first degree murder, whether he had been treated well or threatened, and whether he had been given cigarettes when he wanted them. The defendant's answers were either "yes" or "no." The court said that the evidence that defendant was reasserting his *Miranda* rights was highly "equivocal." The court took into account "the circumstances surrounding the alleged request to discontinue questioning" and took note of his statements at the end of the interview.

Taking into account the entire circumstances surrounding the case at bench and a reading of Officer Singleton's testimony at the motion to suppress hearing (see fn. 4, *ante*), in its entirety, as the court did in *Carr*, I cannot say as a matter of law that the defendant's *Miranda* rights were violated for the reasons hereinbefore stated. Of significance here, as in *Carr,* was the fact that at the conclusion of the defendant's taped statement it appears that the defendant confirmed that no promises or threats were used to obtain his statement, and that he talked freely and voluntarily. Thus, the instant record indicates that the defendant never intended to reassert his *Miranda* rights at the time of the interview by requesting that his mother be present when the interview continued nor was he subjected to any compulsion in completing the interview.

Here, the defendant was afforded counsel at public expense. His attorney after making the panoply of motions in Kern County obtained an order from the Court of Appeal in the Fifth District transferring the case from Kern County to Ventura County for trial. During the protracted, hotly contested 17-day jury trial in Ventura County, approximately 30 witnesses were transported from the Bakersfield area to Ventura to testify and 73 exhibits were placed into evidence. The record on appeal in addition to a voluminous clerk's transcript contains 11 volumes of reporter's transcript consisting of about 2,000 pages of testimony. The jury was fully and fairly instructed on the law including the requisite elements to establish murder in the first degree and the lesser included offenses of murder in the second degree and voluntary and involuntary manslaughter. The jury was also properly instructed on the law of justifiable homicide and self-defense and was given the diminished capacity instructions.

In my view the defendant was fairly tried and justly convicted.

I would affirm the judgment of conviction.[8]

HANSON, J.

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[8]Recognizing that reasonable minds may differ as to the interpretation of evidence and inferences to be drawn therefrom, as well as construing decisional law, I feel compelled to make the following comments and observations.

In my view this case is a classic example of how *Miranda* has been a contributing factor to the bankruptcy of California's criminal justice system. It is generally accepted that an efficient and viable system of criminal justice should prove for the *expeditious* handling of criminal prosecutions and the *penalty* meted out to a person convicted of a crime should be designed not only to serve as punishment but to serve as an example in order to deter future criminal activity by the

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defendant and others. Sound management principles also dictate that the system should be operated as *economically* as possible while insuring every defendant a "fair," not a "perfect,"* trial under the law. This case shows that California's criminal justice system has failed to meet every one of the above enumerated ingredients considered basic to a viable criminal justice system.

QUERY: Does California's criminal justice system process its criminal cases *expeditiously*? Here, the murder of Mrs. Brown on November 15, *1977*, was probably conceived and executed well within a five-minute time span. How much evidence can be brought to bear on what happened during that five minutes? Yet under California's system of justice it took over one year (423 days) for the matter to run its course through the trial courts. It took another year to proceed through this stage of the appellate process. Now due to the reversal the matter must go back to the trial court for the process to start all over again and put the husband and witnesses through another trial. The defendant could well be out of prison on parole before this matter is finally disposed of by the courts.

QUERY: Did the penalty fit the crime? Does California's criminal justice system afford an adequate *deterrent* to such criminal activity? Here, the defendant was sentenced to six years in prison for the second degree murder and an additional one year for the use of a deadly weapon during the commission of the murder. He was given 435 days credit (as provided by law) for the time he was in local custody prior to sentencing and if he behaves himself in prison will probably have his total sentence of 7 years reduced by 1/3. Therefore, his total penalty may consist of less than five years in custody. He deprived Mrs. Brown (age 24) not only of all of her constitutional rights without benefit of trial by jury, but snuffed out over 50 years of her normal life expectancy and denied her husband and family her love and affection.

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*It is clear that a defendant is only entitled to a "fair" trial, not a "perfect" trial. Nevertheless high courts in their quest for the "Holy Grail" of "perfect" justice have paved the street down which the trial judge must walk with procedural safeguards like cobble stones. If the trial judge stubs his toe on one cobble stone, the whole case must often be retried.

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QUERY: Does California's criminal justice system process its cases *economically*? I estimate that the instant case cost Kern County taxpayers and state taxpayers well over a total of $100,000 to process taking into consideration the public funds expended for the lawyers handling the People's case (deputy district attorney at trial and deputy attorney general on appeal) and defendant's court-appointed lawyers (trial counsel and separate appellate counsel); the use of the courts and all the court attaches during the protracted trial; the jurors; transporting about 30 witnesses from Kern County to Ventura County; and the cost of the record on appeal including about 2,000 pages of the reporter's transcript. Now on reversal the taxpayers are faced with the possibility of expending an additional $100,000 if the next time around the case takes its same course.

It must be obvious to everyone that California's criminal justice system is slow, ponderous and wasteful of public funds. Unless the purpose of the system is to continue to build a judicial bureaucracy and afford full employment for lawyers pouring out of our law schools, it should be crystal clear that it would be in the best interest of the public to overhaul our criminal justice system. But no one appears to be in charge and the various governmental agencies appear to be at cross purposes and tend to knock each other out while bending to the will of outspoken special interest groups. However, it is clear to me that instead of conducting business as usual someone in authority on the state level should take the initiative and call a summit conference with all of the branches of government and those elements of government involved in the criminal justice system to dissect and analyze the anatomy of the entire system and thrash out a comprehensive plan which results in a streamlined and integrated system of justice, more expeditious, more economical and more responsive to the needs of California's citizens.**

**A must reading for all who would attend such a summit conference should be the book of Justice Macklin Fleming of the Second District entitled "The Price of Perfect Justice — The Adverse Consequences of Current Legal Doctrine on the American Courtroom" (Basic Books, Inc. 1974). Following is an extract from a chapter of that book entitled "The Ideal of Perfectibility":

"The fuel that powers the modern theoretical legal engine is the ideal of perfectibility — the concept that with the expenditure of sufficient time, patience, energy, and money it is possible eventually

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to achieve perfect justice in all legal process. For the past twenty years this ideal has dominated legal thought, and the ideal has been widely translated into legal action. Yet a look at almost any specific area of the judicial process will disclose that the noble ideal has consistently spawned results that can only be described as pandemoniac. For example, in criminal prosecutions we find as long as five months spent in the selection of a jury; the same murder charge tried five different times; the same issues of search and seizure reviewed over and over again, conceivably as many as twenty-six different times; prosecutions pending a decade or more; accusations routinely sidestepped by an accused who makes the legal machinery the target instead of his own conduct.

"Why, we ask ourselves, have such diligent attempts to create a perfect legal order fared so poorly in practice? If a physicist or engineer or musician or cabinetmaker seeks perfection in his work, he may not achieve it, but in making the effort he will elevate his standards and improve the quality of his performance. Should not the same hold true in the operation of a legal order?

"The answer, perhaps, may be found in the reason given by Macaulay for the failure of ambitious governments; the government that attempts more than it ought ends up doing less than it should. The contradiction of more producing less in the quest for perfection derives from the nature of perfection as complete conformity to an absolute standard of excellence. Perfection itself carries little meaning until we ask the question — perfection for what? And in pondering the answer we come to realize that perfection implies limitation and selectivity, that the ideal of perfection implies movement in a limited and selective direction. The law cannot be both infinitely just and infinitely merciful; nor can it achieve both perfect form and perfect substance. These limitations were well understood in the past. But today's dominant legal theorists, impatient with selective goals, with limited objectives, and with human fallibility, have embarked on a quest for perfection in all aspects of the social order, and, in particular, perfection in legal procedure.

"What happens to criminal procedure when we begin to think in terms of absolutes, in terms of perfect procedure? Perfect procedure requires a perfect tribunal, which in turn demands perfection in court and counsel. Therefore, every criminal cause must be prosecuted by a Thomas Dewey, defended by a James Otis, and tried before a John Marshall. The jury must never have heard of the cause, the parties, the

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witnesses, and the issues, and must be wholly free from opinions or preconceptions about any proposition of law or fact likely to arise in the trial. The parties must be free to present their contentions to the fullest extent and to best advantage. Each legal and factual contention of possible relevancy must be explored in depth, both exhaustively and repetitively, in order to eliminate the possibility of error from the proceeding. If the trial does not satisfy each of these requirements, then the cause must be tried again.

"The quest for perfection in procedure is comparable to the experience of a man who blows up an inner tube and tries to stuff it into a tire too small for the tube. Just as he gets one side in place, out pops the other. In our pursuit of the will-o'-the-wisp of perfectibility, we necessarily neglect other elements of an effective procedure, notably the resolution of controversies within a reasonable time, at a reasonable cost, with reasonable uniformity, and under settled rules of law.

"And here we confirm Macaulay's observation that a system which attempts too much achieves too little. For when we aim at perfect procedure, we impair the capacity of the legal order to achieve the basic values for which it was created, that is, to settle disputes promptly and peaceably, to restrain the strong, to protect the weak, and to conform the conduct of all to settled rules of law. If criminal procedure is unable promptly to convict the guilty and promptly to acquit the innocent of the specific accusations against them, and to do it in a manner that retains public confidence in the accuracy of its results, the deterrent effect of swift and certain punishment is lost, the feeling of just retribution disappears, and belief in the efficacy of the system of justice declines. An overload of court machinery with retrials, rehearings, and collateral proceedings gives us an unworkable system unable to function, like the ostrich that has wings but can't fly, or like the beautiful mockup of the SST that never got off the ground.

"The ideal of perfectibility denies the existence of price and cost, and, at least in criminal procedure, relies heavily on the argument that no sacrifice is too great when human life or liberty is involved. Better that a hundred guilty men should go free than that one innocent man be convicted, is the rallying cry of the perfectionists. But this slogan gets us no further than does its obverse — better that one life should be sacrificed than a hundred others may be saved. The plain fact of the matter is that in human affairs we balance the cost of human life

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against other considerations in almost everything we do, and it is incorrect to say that the sacrifice of human life to attain particular ends is never justified. The real question is one of relative values — is the end in view worth the price it is likely to cost?

"But, the perfectionist argue, no sacrifice is too great to assure that in a given case perfect justice will be done. Ignored is the sacrifice of the legal order itself and of the life, liberty, and property of those that the legal order is designated to protect. Ignored also is the necessity that the procedure we follow lend substance to the moral and ethical idea that those who take up the sword shall perish by the sword.

"Each time the criminal process is thwarted by a technicality that does not bear on the innocence or guilt of the accused, we trumpet abroad the notion of injustice; and each time a patently guilty person is released, some damage is done to the general sense of justice. Most unfortunate, the perfectionists reply, but we must strive for perfect procedure no matter what the consequences. Repeated enough times the slogan gains currency and becomes dogma. In this way the ideal of justice is tranformed into an ideal of correct procedure.

"What has occurred during the past twenty years is that the legal theorists in their zeal for perfection in procedure have become prisoners of their own concepts, and in their preoccupation with techniques they have lost sight of the ultimate objectives of a legal system. This Holy Grail of perfectibility has been sought before, and with equally disastrous results. Gibbon tells us that under Roman law at the time of Justinian the expense of the pursuit of law sometimes exceeded the value of the prize, and the fairest rights were abandoned by the poverty or prudence of the claimants. Holdsworth tells us that in nineteenth century England the equity rules aimed at doing complete justice regardless of any other consideration. In describing the collapse of the system he said: 'But we have seen that the delays need not have been so great if the ideal of completeness had not been so high. By aiming at perfection the equity procedure precluded itself from attaining the more possible, if more mundane, ideal of substantial justice.' "

In the Court of Appeal State of California

DIVISION ONE

PEOPLE OF THE STATE OF CALIORNIA,

Plaintiff and Respondent,

v.

WILLIE EDWARD LEVEL,

Defendant and Appellant.

2d Crim. No. 34398

COURT OF APPEAL- SECOND DIST

FILED

MAR. 26, 1980

CLAY ROBBINS, *Jr. Clerk*

Deputy Clerk

Our opinion pointed out that *Miranda v. Arizona* (1966) 384 U.S. 436, 473-474, demands that once *Miranda* warnings have been given, if an arrestee in a custodial setting "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease;" that the defendant in this case said that he wanted his mother present *before* making any statement; and that by doing so, he invoked his right to have the questioning then going on, cease. The decisions of the Supreme Court of the United States and of this state permit no other result.

In light of the Petition for Rehearing filed by respondent, we add the following, equally established: an adult has no right to demand that a parent (or anyone else, other than a lawyer) be present during questioning (cf. *People v. Burton* (1971) 6 Cal. 3d 375. 383-384; *Fare v. Michael C.* (1979) ____ U.S. ____), but he does have a right to "indicate in any manner . . . that he wishes to remain silent." That is what defendant did. His doing so required that the questioning cease.

The petition for rehearing is denied.

LILLIE

EPSTEIN*

I would grant the petition for rehearing.

HANSON

*Assigned by the Chairperson of the Judicial Council.

Appendix C

Order Due
May 28, 1980

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL
2d District, Division 1, Crim. No. 34398

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE
v.
LEVEL

Respondent's petition for hearing DENIED.

I., G.E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this _____ day of May 5, 1980 A.D 19_____

By _____
Deputy Clerk

_____
Chief Justice

SUPREME COURT
FILED
APR 30 1980
G. E. BISHEL, *Clerk*

In the Court of Appeal State of California
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

WILLIE EDWARD LEVEL,

Defendant and Appellant.

2nd Criminal 34398
(Superior Court No. CR14108)
Ventura Co.

MINUTE ORDER

THE COURT:

APPLICATION FOR STAY OF ISSUANCE OF REMITTITUR AND FOR ORDER DEFERRING EXECUTION AND ENFORCEMENT OF JUDGMENT AND ORDER IS GRANTED.

DATED: MAY 13, 1980

CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the preceding is a true and correct copy of the order of this Court, as shown by the record of my office.

Witness my hand and the seal of this Court this 13 day of May A.D. 1980.

CLAY ROBBINS, JR., Clerk.

By _____
Deputy Clerk

COURT OF APPEAL-SECOND DIST.
FILED
MAY 13 1980
CLAY ROBBINS, JR., *Clerk*

_____
Deputy Clerk

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on May 29, 1980, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand Delivered; forty copies)

Clerk, California Supreme Court
3580 Wilshire Boulevard
Second Floor
Los Angeles, California 90010

Clerk, California Court of Appeal,
Second Appellate District
3580 Wilshire Boulevard
Third Floor
Los Angeles, California 90010

Clerk, Ventura County Superior
Court for the Hon. Bruce Thompson
501 Poli Street
Ventura, California 93001

Carolyn Froeberg, Esq.
330 Washington Street
Marina del Rey, California 90291

Willie Edward Level, C-01113
P.O. Box 441
Chino, California 91710

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 29, 1980 at Santa Monica, California.

Suzanne Newman
(Original signed)